THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

WRIT PETITION No. 6914 of 2007

% 13-06-2007

Between:

A.Krishna Reddy, Partner in charge of
AKR – Coastal (JV), Road No.12, Banjara Hills,
Hyderabad.

... Petitioner

and

The Gvot.of A.P., rep. by its Secretary,
Irrigation & CAD (Major Irrigation-III) Department,
Secretariat, Hyderabad & others

…Respondents

! Counsel for the Petitioner : Sri D.Prakash Reddy

^ Counsel for Respondents : Sri O.Manohar Reddy and
GP for Irrigation

<Gist :

>Head Note :

? Citations:
-Nil-

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O R D E R:

The Superintending Engineer, SRSP, Circle No.1, the 3rd respondent herein, invited tenders, through E-procurement platform on 29.9.2006, for the work of formation of an Earthern Dam, construction of spill way, Head Regulators, Left and Right side lead channels, high level B.T. road, including construction of DLR bridge and two irrigation canals, including distributaries, for a project at Mothe village of Ramadugu Mandal, Karimnagar District. The work comprised of investigation, designing and execution. The Internal Bench Mark value of the work was mentioned as Rs.99.80 crores, and tenders with technical and price bids were to be submitted 'on line' by 5.12.2006. The petitioner and 8 other tenderers

responded. On 11.12.2006, 8 tenders were opened, and it was found that the amount quoted by the petitioner i.e. Rs.79,02,47,000/-, was the lowest. The tender submitted by the 4th respondent, by name M/s.Manisha & Mulay (joint venture) was rejected, on the ground that it failed to upload the scanned copies of bank guarantee towards EMD.

The 4th respondent made a representation to the Chief Engineer of the concerned unit, the 2nd respondent herein, and the Government in the Irrigation Department, the 1st respondent, stating the circumstances, under which the defect in uploading the scanned copies occurred. The matter was referred to the Commissionerate of Tenders. The Commissionarate is said to have recommended that the tender submitted by the 4th respondent also be considered, since it had uploaded the necessary information through online, and hard copies were submitted. Acting on this recommendation, the 1st respondent issued memo, dated 28.3.2007, permitting the 2nd respondent, to open the price bid of the 4th respondent. The said memo is challenged in this writ petition, alleging that it contravenes the conditions of tender notice, apart from being illegal and arbitrary.

On behalf of respondents 1 to 3, a counter affidavit is filed. It is stated that the price bid of the 4th respondent was not opened, on account of the fact that there was a technical error and defect in the tender document. It is stated that the representation made by the 4th respondent, soon after opening the price bids, was examined by an expert body, and an objective decision was taken thereon. Copies of several documents, which had a bearing on the issue, are enclosed. It is further contended that in view of the controversy that ensued

subsequent to the impugned order, the office of the 1st respondent issued a letter, dated 2.4.2007, to the processing agency, the 5th respondent, not to restore the tender submitted by the 4th respondent.

The 4th respondent filed an independent counter affidavit. According to it, the uploading of the scanned copies of the demand draft for EMD was done, but did not materialise, on account of a technical snag. It is urged that the EMD was furnished, the information relating thereto was made part of the tender document, and that the hard copies of the document were furnished, much before the due date. The 4th respondent contends that opening of its price bid would, at the most, result in a healthier competition, and no prejudice can be said to have suffered by the petitioner.

Sri D.Prakash Reddy, learned senior counsel for the petitioner, submits that the tender notice is emphatic, as regards the conditions to be complied with by the tenderers, and uploading of the scanned copies of the demand draft for EMD was treated, as an essential and necessary condition. He contends that there was a clear non-compliance with an important condition, on the part of the 4th respondent, and the same has naturally resulted in rejection of its tender. Learned senior counsel submits that the decision taken by the 1st respondent permitting the price bid of the 4th respondent to be opened, is not referable to any condition of the tender, much less any provision of law, and the arbitrariness in the whole exercise, is evident from the timing, as well as the nature of the decision. It is also his case that the subsequent letter addressed by the 1st respondent to the 5th respondent, not to restore the tender of the 4th respondent, would indicate that the decision communicated through the impugned order,

does not stand the scrutiny of law.

Learned Government Pleader for Irrigation and

Sri O.Manohar Reddy, learned counsel for the 4th respondent, on the other hand, submit that the ground, on which the tender submitted by the 4th respondent was rejected, was purely hyper-technical, and once it was found that the tender was otherwise in order, the corrective steps were taken. They plead that the petitioner does not have the right to challenge the impugned order, since no valid rights can be said to have accrued to him, as of now.

The Government of Andhra Pradesh sanctioned an irrigation project to be constructed, at a place by name Mothe in Karimnagar district. Tenders were invited, through the process of

E-procurement, by entrusting the service to the 5th respondent. The manner in which the tenders must be submitted, is stipulated in the tender notice, dated 29.9.2006. The process comprised of two stages, *viz*; technical bid and price bid. One of the conditions of tender is that an amount of Rs.110 lakhs must be furnished as EMD. The relevant clause reads as under:

> "25) **General Terms and Conditions**:
>
> 1) …
>
> 2) EMD of Rs.110 lakhs to be paid in shape of unconditional and irrevocable Bank Guarantee in the standard format provided in the tender document in favour of Superintending Engineer, I&CAD Department, SRSP-FFC Circle No.1, Dharoor Camp, Jagtial, or, in the shape of Demand Draft in favour of Assistant Pay & Accounts Officer, SRSP, LMD colony, Karimnagar, to be valid for a period of six months from the date of bid submission. The DD/BG shall be obtained from any Government owned public sector bank or any scheduled commercial bank. Scanned copy D.D./B.G. towards EMD may be uploaded with the bids and originals must be submitted to the Superintending Engineer through

registered post/courier/ personally before opening of the price bid. Failure to furnish the original D.D./B.G. before opening of price bid will entail rejection of bid and black listing."

A note was appended to this condition, as regards the manner of furnishing. It reads as under:

"11) ***Note***:

a) Any other condition regarding receipt of tenders in conventional method appearing in the tender documents may please be treated as not applicable.

(b) The tenderers should invariably upload the scanned copies of EMD and transaction fee uploaded with the bids and originals must be submitted to the Superintending Engineer through registered post/courier/personally before opening of the price bid. The price bid of only such tenderers will be opened"

The petitioner, 4th respondent and 7 others, submitted their tenders. Except the tender submitted by the 4th respondent, rest of them were opened, on the notified date. The amount quoted by the petitioner was found to be the lowest. The tender submitted by the 4th respondent was rejected, at the stage of technical evaluation, on the ground that the scanned copies of the EMD and transaction fee were not uploaded. Soon thereafter, the 4th respondent submitted a representation to the respondents. The Commissionerate of Tenders made recommendation in favour of the petitioner and that resulted in issuance of the impugned memo.

In any transaction, that has to result in award of contract, the concerned agency stipulates several conditions. While some of them are important and essential, the others do not assume that much significance. While compliance of the former category of conditions is mandatory, any deviation from the later part of the conditions, would not have serious affect, on the rights of the parties to the transaction.

Classification of the conditions of a contract as essential and non-essential, is certainly a difficult task, particularly when the concerned document is silent as to their nature. Where, however, the document gives clear indication as to the nature of conditions and indicates the consequences of

non-compliance, the courts cannot substitute its opinions, even if a different view is possible.

In the ordinary course, mere deposit of EMD can be treated as sufficient compliance with the condition, by a tenderer. However, in the context of the procedure that was adopted for the present tenders *viz*; in E-procurement, a further compliance was treated as essential and necessary. Apart from furnishing guarantee through EMD, the tenderer was required to upload the scanned copy. Howsoever technical the requirement may appear, the importance given to it by the 1st respondent, the Government cannot be undermined. Apart from defining the nature of requirement, the notification categorically stated that the condition is important and essential, and non-compliance with the same would entail in the consequence of the price bid, being not opened.

Hardly any doubt persists, as regards the importance of the requirement of uploading the scanned copies of EMD. The use of the word 'invariably" has its own significance. The word means that the subject or phenomenon, which is qualified by it is "never changing and constant" (Websters Dictionary of the English Language). In other words, even if there exist valid and justifiable ground for non-compliance, the condition remains constant and unchangeable. Admittedly, the 4th respondent did not comply with this condition. In his counter affidavit, the 3rd respondent narrated his understanding of

the condition and the decision taken by him, in this regard, *vis-à-vis* the 4th respondent, as under:

> "5) … The bidders invariably shall upload the scanned copies of the proof of online submission towards transaction fee. Further, the bidders shall submit the proof of online submission towards transaction fee to the Superintending Engineer through registered post/courier/personally before price bid opening.
>
> The price bid of only such tenders will be opened. Failure to furnish the original D.D./B.G. before opening of price bid will entail rejection of bid.
>
> 6) It is submitted that considering this as a lapse I have not opened the price bid of M/s.Manisha & Mulay (JV) on 11.12.2006 and opened the price bids of bidders from Sl.No.1 to Sl.No.8 stated above and M/s. AKR-Coastal (JV) stood as the lowest bidder for a TCV of Rs.79,02,47,000/-"

The 4th respondent was naturally aggrieved by the rejection of its tender, and accordingly made a representation. The matter was referred to the Commissionerate of Tenders. At its meeting held on 7.2.2007, i.e. nearly two months after the tenders were opened, the price bid of the 4th respondent is permitted to be opened. This was followed by the impugned memo.

Neither the Commissionerate, nor the 1st respondent, stated or explained as to how a condition, which was so essential, can be relaxed. Further, by the time the decision was taken, the picture as to the amounts quoted by various tenderers had already emerged. It is not as if this decision would not have any effect on an otherwise successful tenderer.

The tender document itself mentioned that bidders are eligible for award of 3 medium size packages, only in Irrigation Department. It is opt to refer to clauses (1) to (3) of special conditions of the tender

notice;

> "1) The bidders are eligible for award of 3 medium size packages only in Irrigation Department of Government of Andhra Pradesh from 1.4.2006 onwards.
>
> 2) Bids will be opened in serial one after another as per packages indicated in serial number wise as published in bid notices issued.
>
> 3) The moment of the bidder is found successful for further packages will not be opened."

It would be sufficient that a tender is declared as a successful tender, in the context of restricting the number of works to 3. In the instant case, the petitioner was declared as successful tenderer for 3 works, including the one, which is the subject matter of this writ petition, and thereby, it incurred disqualification for other works. If the status of the petitioner, as the lowest tenderer, is disturbed on account of the impugned order, he would be subjected to loss and disadvantage.

There would have been some justification for the respondents 1 to 3, in permitting the tender submitted by the

4th respondent to be opened, if the tenders received those for did not entail in competitive or economical quotations. It is already pointed out that the value of the work was estimated at Rs.99.80 crores, and the lowest bid is 79.02 crores. Viewed from any angle, the respondents were not justified in issuing the impugned order.

It is relevant to mention that the criticism that emerged after the impugned memo was issued, is so severe, that the Government itself has chosen to reverse the decision, but not so in clear terms. The impugned order was passed on 28.3.2007. News items appeared in relation thereto, on 1.4.2007. On 2.4.2007, a memo was issued to the following text, by the office of the 2nd respondent:

> "In the light of the adverse reports in the news the

> Superintending Engineer, FFC Circle, Jagtial is requested not to open the tender of Manisha-Mulay (JV) and carry any further process of tendering till further instructions of the Government are communicated."

The nature of steps taken by respondents 1 to 3, ever since the opening of tenders, would disclose that they were searching more for an alternative, to an otherwise successful tenderer, than to ensure prompt and effective completion of the work. Absolutely for no reason, the whole tendering process was stalled for almost four months. The amount of escalation of prices, in the meanwhile, and the change of circumstances, is anybody's guess.

For the foregoing reasons, the writ petition is allowed, and the impugned order is set aside. The respondents 1 to 3 shall take steps, to finalise the matter relating to award of contract, on the basis of the results, that emerged on the opening of the tenders, on 11.12.2006, without any further loss of time. There shall be no order as to costs.

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(L.NARASIMHA REDDY, J)

Dt: 13th June 2007
L.R. copies be marked.
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